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COMMITTEE ON JUDICIARY

February 9, 2005

LB 130, 727, 729, 410, 755, 756

The Committee on Judiciary met at 1:30 p.m. on Wednesday, February 9, 2005, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB 130, LB 727, LB 729, LB 410, LB 755, and LB 756. Senators present: Patrick Bourne, Chairperson; Dwite Pedersen, Vice Chairperson; Ray Aguilar; Ernie Chambers; Jeanne Combs; Mike Flood; Mike Foley; and Mike Friend. Senators absent: None.

SENATOR BOURNE: (inaudible) get started, apologize. Welcome to the Judiciary Committee. This is our ninth day of committee hearings. We'll be hearing six bills today. I'm Pat Bourne from Omaha. To my left is Senator Friend from Omaha; Senator Aguilar from Grand Island. The committee clerk is Laurie Vollertsen. Michaela Kubat is our legal counsel. Senator Chambers from Omaha; Senator Foley from Lincoln; and Senator Pedersen from Elkhorn. I'll introduce the other members as they arrive. Please keep in mind that legislators will be coming and going throughout the afternoon to introduce bills and conduct other business so don't take it personally if you're testifying and a senator leaves. If you're planning on testifying on a bill, we're going to ask that you use the two on-deck chairs and sign in in advance prior to your testimony. Following the introduction of each bill I'll ask for a show of hands. We'll take proponent testimony, then opponent testimony and then neutral testimony. When you come forward to testify please state your name and spell it clearly, state it clearly, spell it clearly for the transcribers. All of our hearings are taped. The transcribers will greatly appreciate you spelling your name. Due to the large number of bills we hear on the Judiciary Committee we are going to use the Kermit Brashear memorial lighting system. Senators will get five minutes to open and three minutes to close if they choose to do so. All other testifiers will get three minutes exclusive of any questions that the committee might have for you. The blue light goes on at three minutes. The yellow light comes on as a one-minute warning. And then when the red light comes we ask that you stop. The rules of the Legislature state there are no cell phones allowed. If you have a cell phone please disable the ringer. And lastly, we will allow you to submit someone else's testimony but we won't allow you to read it in the record. With that,

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Senator Brown to open on LB 130.

LB 130

SENATOR BROWN: (Exhibit 1) Thank you, Senator Bourne and members of the committee. And, Senator Chambers, are you aware that you don't have a nameplate?

SENATOR CHAMBERS: If I'm not known by now they'll never, never, never know me. Oh, yes (laughter).

SENATOR BROWN: (laugh) I am Senator Pam Brown. I represent District 6 in Omaha and I'm here today to introduce LB 130. LB 130 is a repeal of legislation that was passed last year. The legislation was passed with a delayed implementation date so that it could be repealed if that was necessary. The bill was very simple. It allowed for copies in the case of housing discrimination testing situations. And at the time that the bill was passed there was some concern that this might bring us out of compliance with HUD regulations in terms of fair housing. Nebraska is one of 27 states that have fair housing legislation. Ours was passed in 1991 so the underlying legislation was a part of our fair housing law that was passed in 1991. A few years ago, Nebraska was one of twelve states that agreed to participate in a testing program. And in the course of this testing program, some of the individuals who had complaints against them wished to receive information by way of copies. Our underlying legislation allowed for access to the records. There was some concern that access was available only to those individuals who lived in Lincoln and individuals in other parts of the state could not get the access that our underlying legislation called for. And so LB 625 from last year sought to clarify it so that copies could be allowed. HUD has indicated that this puts us out of compliance with federal legislation about discriminatory housing practices. And, as a result, the money that we receive from HUD may be in jeopardy. The amount of money that is in jeopardy is still something of an item for discussion. But my promise when this bill was passed, I have grave reservations about aspects of the testing program. But I don't want in any way to jeopardize the real people who have discrimination complaints and their ability to be served by the NEOC. And so if this in any way does that, if the previous bill,

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LB 625, in any way does that, jeopardizes our ability to function in a way where real people are involved in real discrimination cases, then I believe that we should repeal the legislation from last year and that's what this bill does. And I would be glad to answer any questions.

SENATOR BOURNE: Thank you. Questions for Senator Brown? Seeing none, thank you.

SENATOR BROWN: And I will waive closing. I am going to get back to the other committee.

SENATOR BOURNE: Thank you very much.

SENATOR BROWN: But there will be some others following to answer other issues. Thank you.

SENATOR BOURNE: Thank you very much. Could I get a showing of hands of those individuals testifying in support? I see one, two, three...six. Those in opposition? No opponents. Any neutral testifiers? Okay. Again, we're going to make use of the on-deck area so those that are wanting to testify in support, please use these two on-deck chairs and sign in. Welcome.

TIMOTHY BUTZ: (Exhibit 2) Welcome. No, I'm welcome. Thank you (laugh). I have some written testimony. My name is Timothy Butz. I'm executive director of ACLU Nebraska. I'm not going to read my testimony. I don't believe in doing that. You can read it at your leisure. Let me hit a couple of important points. On Monday there was a fiscal note published on this bill that showed HUD had some concerns regarding other aspects of the Nebraska Fair Housing Act that were not affected by LB 625. And I've been working with Gary Fischer of the Fair Housing Center, Betty Bottiger of the Nebraska Office of HUD's Office of Fair Housing Enforcement and Elizabeth Frank who's the deputy director of Equal Opportunity and Fair Housing Enforcement at HUD's headquarters in Washington, D.C. Attached to my testimony are amendments that will correct the problems noted in the fiscal note. And these have been vetted by HUD. As of 20 minutes ago, HUD said that these were okay. These would resolve their problems. What we're going to do is clarify some privacy concerns that HUD has about in the amendments, the first one clarifies the privacy of conciliation

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material. It allows the NEOC to release a fully-executed conciliation agreement but none of the underlying documents, none of the correspondence, records of discussions, give and take that go on in settling a case. And the second amendment clarifies two things. One, that information cannot be released from the NEOC's files prior to the completion of an investigation. And I'm sure Senator Friend can tell you how releasing information in the course of an investigation can compromise it. So HUD wants that cleaned up and they also wanted to make it clear that these documents are subject to both state and federal privacy laws. So that's what these two amendments do, amending Section 20-331 and Section 20-330(2). There's no need to go back and discuss what happened with LB 625. The problem is if we don't make an amendment the NEOC is going to lose a quarter million dollars a year for the next two years and thereafter actually which I think will significantly impair their ability to conduct fair housing investigations. This is not money the state in its current fiscal posture can afford to make up and if it's not corrected, if the Fair Housing Act isn't amended and that money is lost there will just be no state enforcement of the Fair Housing Act, at least none that's significant. And with that, I'll stop and if you have questions I'll be glad to answer them.

SENATOR BOURNE: Thank you. We've been joined by Senator Combs. Questions for Mr. Butz. So, Tim would...oh, excuse me, Senator Friend.

SENATOR FRIEND: No, only...Mr. Butz, only to point out that I think you're giving me way too much credit. I think you're probably confusing me with a couple of my cousins who are on the police force so I...

TIMOTHY BUTZ: Oh, okay, I'm sorry. You're not a retired officer?

SENATOR FRIEND: I am not so I...

TIMOTHY BUTZ: You're the only one in the family (laugh).

SENATOR FRIEND: ...I think I do know what you're talking about but at the same time, probably giving me a tad too much credit.

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TIMOTHY BUTZ: I apologize then.

SENATOR FRIEND: That's okay, but just a comment.

TIMOTHY BUTZ: Not that if you were retired that would be anything less than honorable.

SENATOR FRIEND: I wish I was retired (laughter).

SENATOR BOURNE: Further questions? So, Tim, what you're saying is that there's some language that you're suggesting that we add...

TIMOTHY BUTZ: Right.

SENATOR BOURNE: ...to the section of housing that wasn't impacted by last year's bill...

TIMOTHY BUTZ: Right.

SENATOR BOURNE: ...but would clarify and clean up and...

TIMOTHY BUTZ: What happened is that when HUD reviewed the changes that were created by LB 625 they didn't limit their review to just the language of LB 625. They went back and they took a look at the entire Nebraska Fair Housing Act.

SENATOR BOURNE: Do we have that letter from HUD? Is that...okay, somebody, it sounds like it's forthcoming. Okay.

TIMOTHY BUTZ: The NEOC has a letter that I think explains HUD's concerns also and that's what the fiscal note was based on. I did not get a copy of that letter. I just saw it through the fiscal note. I'll be real honest with you, Senator. When this law was passed in 1991, the executive director of the NEOC at the time was Larry Myers. And Mr. Myers did some cajoling, some handshaking, some backslapping, and got the Nebraska law certified with these flaws in it. And I think it was really a matter of his personality and his perseverance in getting it done because the flaws that are being corrected with these amendments are flaws that have existed since 1991. At one point, I think HUD was willing to turn a blind eye to it because they trusted Myers to enforce the law in a spirit that was

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consistent with federal law. Things have changed, new people are at HUD now. Those people are more by the book, I think, than their predecessors and they found these flaws and they brought them to the attention of the NEOC and found their way in the fiscal note. And now we have to find a way out. The jar was opened.

SENATOR BOURNE: Okay, thank you.

TIMOTHY BUTZ: Okay?

SENATOR BOURNE: Further questions for Mr. Butz? Thank you.

TIMOTHY BUTZ: Thank you.

SENATOR BOURNE: Next testifier in support and anyone that testifies that wants to comment on the additional language proposed, please do so. So, again, we're going to make use of the on-deck areas. Those people testifying in support, please move to the front and sign in. Welcome to the committee.

LEND S. FRISON: (Exhibits 3, 4) Good afternoon. My name is Lend Frison. The first name is spelled L-e-n-d. My middle initial is S. as in Steven. Last name is Frison, F-r-i-s-o-n. Good afternoon, Senator Bourne and members of the committee. The first thing I would like to do is acknowledge the Nebraska Equal Opportunity Commissioners who are here this afternoon as well. The NEOC is an enforcement agency that handles housing, employment, and public accommodations, charges of discrimination. We are here in support of LB 130 and our goal is to have LB 625 rescinded primarily and this is due to three reasons and I'll be very brief. The first reason is that the rescinding of this bill would help us to avoid being decertified by the Housing and Urban Development Department. If LB 130 is not approved, we will lose funding in the amount, to be specific, of \$250,000 for this fiscal year. I'm sorry, for the next fiscal year. This would further cause a burden on our agency to go out to investigate housing discrimination complaints. The loss of funding further would have a negative impact on the staff of the NEOC. There would be four positions that we would lose as a result of negative funding. That would be two investigators, a public information officer, as well as a staff assistant. We really urge and we strongly ask that

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you consider making the changes that have been recommended by the Housing and Urban Development as well as, you know, think of the NEOC and the work that we do. Without further delay, I just want to just say thank you for this opportunity. I wanted to be as specific as possible but thank you for the opportunity to testify, you know, on this critical matter and I'll be glad to answer any questions at this time.

SENATOR BOURNE: Thank you. Questions for Mr. Frison? Seeing none. Thank you very much.

LEND S. FRISON: Thank you so much.

SENATOR BOURNE: Appreciate your testimony. Next testifier in support?

GARY FISCHER: (Exhibit 5) Good afternoon. My name is Gary Fischer. I'm the general counsel to Family Housing Advisory Services which is a nonprofit Nebraska company that is the only qualified fair housing organization in Nebraska and Iowa, recognized by HUD to do the kind of work that we do which is to support fair housing enforcement work. I'm not going to read my testimony. I did provide you with the written testimony. I just wanted to lend my support to the amendments that Mr. Butz talked about. Those amendments are identical in my testimony to the amendments that he handed to you. We just didn't know if we were both going to make it here so (laugh) we pretty much did the same thing. One thing I would point out to you is that the amendments that were drafted, if you note in the fiscal note there was a suggestion that an Attorney General's clarification be sought. What the amendments do is they take care of the need for seeking an additional Attorney General's clarification by including language actually in the statute that clarifies the applicability of the privacy laws that the letter from HUD was concerned with. So the amendments that are proposed deal with the need for a clarifying Attorney General's opinion as well as the other suggestions that came directly from the HUD letter to the state. And I apologize to Mr. Frison for not having the opportunity to get those to him prior to this hearing so he could review those. We just got them at the eleventh hour here vetted through HUD's counsel in DC so we just didn't have them until the last minute here. I'd be happy to answer any

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questions about them or any other questions about my written testimony or questions you might have.

SENATOR BOURNE: Thank you. Questions for Mr. Fischer? Seeing none, thank you.

GARY FISCHER: Thank you.

SENATOR BOURNE: Next testifier in support?

KORBY GILBERTSON: Good afternoon, Chairman Bourne, members of the committee. For the record, my name is Korby Gilbertson. That's spelled K-o-r-b-y G-i-l-b-e-r-t-s-o-n. I'm appearing today as a registered lobbyist on behalf of the Nebraska Realtors Association in support of LB 130. Before I give you my testimony on LB 130, I want to first thank Senator Brown for working with us on this process through the last couple of years and secondly, to acknowledge the good working relationship and open lines of communication that the realtors have experienced with NEOC over the past several months and thank them for working with us on these issues. Like Senator Brown said in her opening, this has been kind of a process that we've been going through for the last couple of years. Last year while we were working on LB 625 we could not get an answer from HUD on what they would do if LB 625 was passed. So that is the reason why the later operative date was put in the legislation so that we could hopefully get a response from HUD before the legislation would take effect. And we all, at that time, agreed that if it would impact the funding, the language in LB 625 would be rescinded. And I was part of that agreement and so that's why the realtors support LB 130. I have not seen Mr. Butz's proposed amendments. I will tell you that historically one of the issues he talked about the realtors have had some serious concerns with which is the language of not releasing any information while an investigation was still in process. The reason why that is a concern is because there is an offer of a conciliation during the investigation. And that's why we came to this point to begin with. These people are asked to sign a conciliation agreement and to pay an amount of money before they are given full information. And if that is cut off and they have no access to that information they do not know all of the facts surrounding the charges. And so that is a real concern with the realtors and that's what brought us here to

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LB 130, 727

begin with. So I ask that you keep that in mind and we'd be happy to look at the amendments but at this point I cannot make any promises either way. I'd be happy to answer any questions.

SENATOR BOURNE: Thank you. Questions for Ms. Gilbertson? Seeing none, thank you.

KORBY GILBERTSON: Thank you.

SENATOR BOURNE: Next testifier in support? Testifiers in opposition? Any neutral testifiers? Senator Brown has waived closing. That will conclude the hearing on LB 130. Senator Stuthman to open on LB 727.

LB 727

SENATOR STUTHMAN: Good afternoon, Senator Bourne and members of the Judiciary Committee. I'm Arnie Stuthman, A-r-n-i-e S-t-u-t-h-m-a-n and I represent the 22nd Legislative District and I'm here before you today to introduce LB 727. LB 727 standardizes and clarifies the amount of filing fee that should be charged when a change of venue has been granted. Under existing law, it is not clear when a fee should be charged when a change of venue has been granted. District courts are now charging the cost of the filing fees on new cases and sometimes no fee at all. The fee is not intended to be a revenue generator for counties. This bill will simply create a uniform fee for all changes of venue. The filing fee will be placed in the county general fund. These are my opening comments and I will try to answer any questions if you have any but I do have the Platte County clerk of the district court will testify behind me and she would be the expert to answer the questions if you have any.

SENATOR BOURNE: Thank you. Could I get a showing of hands before we ask questions from Senator Stuthman, a show of hands of those individuals testifying in support? I see one. Those in opposition? None. Neutral? None. Questions for Senator Stuthman. Seeing none, thank you.

SENATOR STUTHMAN: Thank you.

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LB 727

SENATOR BOURNE: First testifier in support?

MARLENE VETICK: Good afternoon, members of the committee. My name is Marlene Vetick. I spell it V-e-t-i-c-k. I'm a clerk of district court from Platte County and I'm also here representing the Clerks of District Court Association. As Senator Stuthman spoke, I couldn't be any more eloquent. We are requesting that a filing fee of \$25 be charged in cases where a change of venue has been granted. Providing for this filing fee again will create uniformity in the courts. Currently under such existing law we have, it is not clear whether a fee should be charged or not and our district courts are charging from one spectrum to another either a new case filing fee of either \$101.50 or \$76.50 to no fee at all. Changes of venue can be granted for various reasons but only upon an order granting such change by a judge will the fee charged and collected. I'd be happy to answer any questions you have.

SENATOR BOURNE: Thank you. Questions for Ms. Vetick. Senator Chambers.

SENATOR CHAMBERS: What is this money going to be used for?

MARLENE VETICK: Well, it would be like any other filing fee that we collect. It's paid to the county general fund so it supports the county.

SENATOR CHAMBERS: Okay. So it has nothing to do with just the court system. They can spend it on roads or anything they want to since it's in the general fund.

MARLENE VETICK: Exactly.

SENATOR CHAMBERS: And if this bill is not passed, the county is not budgeting this amount, are they?

MARLENE VETICK: No, no.

SENATOR CHAMBERS: Okay. Thank you.

SENATOR BOURNE: Thank you. Further questions? Seeing none, thank you.

MARLENE VETICK: Thank you.

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LB 727, 729

SENATOR BOURNE: Further testifiers in support? Testifiers in opposition? Testifiers neutral? Senator Stuthman to close. Senator Stuthman waives closing. That will conclude the hearing on LB 727.

SENATOR Dw. PEDERSEN: We will now open the hearing on LB 729. Senator Bourne is here to introduce. Whenever you're ready, Senator Bourne.

LB 729

SENATOR BOURNE: Thank you, Senator Pedersen, members of the Judiciary Committee. My name is Pat Bourne. I represent the 8th Legislative District in Omaha, here today to introduce LB 729. This bill would clarify that clerks of the district court are entitled to a fee for making a complete record of a case and that the fee cannot be waived. Currently, district court clerks are required to make what is basically a permanent copy of a case file and a \$15 fee is charged. However, current law also allows that the fee be waived. Because the \$15 fee is taxed as part of the case costs the clerk must refund the fee by either filing a claim for the refund from the county or issue a refund check. This creates a lot of paperwork and results in the court not being paid for these costs. Under LB 729, the fee is automatically waived for Title IV-D cases, in forma pauperis cases and civil cases filed by county attorneys. The fee would apply to criminal cases filed by a county attorney but the fee could be assigned at the disposition of the case.

SENATOR Dw. PEDERSEN: Thank you, Senator Bourne. Any questions from the committee? Seeing none, can I sample those in attendance? How many people are here to testify in favor of this bill? See one. Opposed? None. Neutral? None. Go ahead, take the stand, ma'am and I'll turn the committee back to Senator Bourne.

MARLENE VETICK: Good afternoon again, committee members. My name is Marlene Vetick, spell it V-e-t-i-c-k. I'm a clerk of district court from Platte County and also representing the Clerks of District Court Association. We are requesting that the complete record fee be nonwaiverable. Currently, at the conclusion of a case the

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parties have the option to waive the complete record being created. Consequently, the \$15 fee is then refunded. However, under records retention schedules the district court clerk is required to create a permanent record of the case filed before it can be destroyed. Thus, those parties who have waived the record and received the refund of the fee will receive the same benefit as those who have not waived the record nor been refunded. Since the county pays for the costs of microfilming or imaging it is to the county's benefit to make this fee nonwaiverable for the reasons aforesated. If you have any questions, I'd be happy to answer them.

SENATOR BOURNE: Thank you. Questions for Ms. Vetick? Seeing none, thank you.

MARLENE VETICK: Thank you.

SENATOR BOURNE: Next testifier in support? Testifier in opposition? Testifier neutral? Closing is waived. That will conclude the hearing on LB 729. Senator Chambers, since Senator Flood is opening on another bill, would you want to go ahead with LB 755?

SENATOR CHAMBERS: Yes.

SENATOR BOURNE: Senator Chambers to open on LB 755.

SENATOR CHAMBERS: Mr. Chairman, could we take LB 756 first in case he comes because it's much simpler.

SENATOR BOURNE: Absolutely.

SENATOR CHAMBERS: Okay.

SENATOR BOURNE: Senator Chambers to open on LB 756.

LB 756

SENATOR CHAMBERS: Thank you. Mr. Chairman, members of the committee, I'm Ernie Chambers. I represent the 11th Legislative District in Omaha and what this bill does is to supply a provision that ought to have been in the original law that is being amended. If you look at the green copy of

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LB 756

the bill you will see where the new language is added. And the language that's added makes it clear that when...first of all, the law being amended relates to the taking of biological or nontestimonial evidence from a person. If there is probable cause that a crime was committed and a person is not willingly going to give one of these samples, a court order can be entered requiring this person to give a sample. Since a person cannot be compelled to testify against himself or herself there can be no questioning, no interrogation, nothing along that line. All they can do is take the sample whether saliva, blood, or whatever. The Nebraska Supreme Court was presented with a case that challenged that law because all it states without my amendment is that there be probable cause that a crime was committed. The Nebraska Supreme Court in the case of State v. Evans at 215 Neb. 233 in 1983 case stated that in order to save this law from being struck down the court would interpret it to require that there also be probable cause that the person who was subject of the order committed the crime. Otherwise, the law would just be wide open and would say, if there is probable cause to believe that a crime was committed then a court order can be entered making anybody give one of these samples even though there's no connection between that person and the crime. So all this bill does is to put the language into the law that the Supreme Court said it would interpret the law as including. Whenever I become aware of something like this my view is always that a person should be able to go to the statute and see what the law is and not have to read or search for a court opinion which you may not even know exists which will fill in the gaps that the Legislature left. In reality, that law should have been struck down and the Legislature should have had to come back again because apparently some judges by not being aware of this case have signed orders requiring people to give these samples when there was no probable cause. And to give you one example since I have a little time, there was supposed to be a serial rapist on the loose in Omaha which means that several rapes had been committed by the same person. There was an individual who was a neighbor of one of the victims. The police brought him to her in a one-person lineup. She said, no, I know him. He's my neighbor. He didn't do anything. He had nothing to do with it. She was one of the victims in this series of rapes. Later on, the police came back and got a court order to compel him to give a DNA sample even though he had been cleared by the victim. So if

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you just read the language of the law as it exists the judge could say, well, I did what the law said. There was probable cause to believe a crime was committed and I didn't have to have probable cause that this man did it. Because in the police officer's affidavit the acknowledgement was made that the victim had cleared him. But they were gathering DNA for a database in conjunction with the federal grant they got which would last for a certain period of time so they wanted to round up as many samples of DNA as they could. Since this man had been questioned in connection with this other incident they just went and got him again and he said, no, I'm not going to give you DNA because the woman already cleared me. So the judge signed the order. They took him to the police station and took his DNA and he can't even get it back now even though he's been cleared twice because the DNA sample indicated he wasn't involved in anything either.

SENATOR BOURNE: Thank you. Questions for Senator Chambers? Senator Friend.

SENATOR FRIEND: Just real quickly. If we change that situation that you just gave to sort of a hypothetical. And it's been years since I've even delved that closely into criminal law but can you give a hypothetical that in that particular situation that would have given law enforcement officials the appropriate probable cause to take his DNA? I mean...

SENATOR CHAMBERS: No, they wouldn't have had it. And the judge couldn't have even had the pretense...

SENATOR FRIEND: What...

SENATOR CHAMBERS: ...because the law would make it clear that with no probable cause to believe he committed the crime then they couldn't get it. And there couldn't possibly be probable cause because the victim exonerated him.

SENATOR FRIEND: Okay. But I guess what I'm asking you for is almost like a miniature law lesson. What would have changed that scenario? I mean, would somebody have had to have said in that lineup situation with three or four people there, yeah, maybe...

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SENATOR CHAMBERS: No, he was the only one.

SENATOR FRIEND: No, I know but it would have changed it. I mean, probable cause...I'm looking for...

SENATOR CHAMBERS: You mean what would create probable cause...

SENATOR FRIEND: ...most people, on the record most people...exactly.

SENATOR CHAMBERS: Okay. If they had a description and the law says it must be particular, to avoid what they call a general warrant which gives police the authority to just go out and pick up people in a dragnet, it has to describe the individual with particularity, meaning that you wouldn't by this description say it could be either Senator Friend or Senator Aguilar. It has to be sufficiently specific so that the individual that you go after fits the description and the description doesn't fit just anybody. So let's say a description was given. The man was wearing a dark suit with a funny looking tie, a white shirt. He had gray hair. He looked in the opinion of some people like Mel Gibson when he smiled. And he was a banker and he's in the Legislature and his first name begins with the letter S, the last name F but I'm not sure. And then give height, weight and address. Then they'd have probable cause to suspect, Senator Friend, that you might be the one they're looking for so if they approached you and you were not willing to give a sample then they would go and present this evidence to the judge. And if the judge believed that that was probable cause he would sign the order. But if he didn't believe it was probable cause he wouldn't sign it.

SENATOR FRIEND: Okay. And a person could be held through that process? I mean, I'm looking for practical...

SENATOR CHAMBERS: It gives the number of hours, a certain number of hours that they can be held.

SENATOR FRIEND: Okay. Thanks.

SENATOR CHAMBERS: Um-hum.

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LB 756

SENATOR BOURNE: Thank you. Further questions for Senator Chambers? Seeing none, thank you. Next testifier in support?

MARK RHODES: Sorry. I was out of the room. Is this 755?

SENATOR BOURNE: I'm sorry. We are on LB 756. I'm sorry, we juggled the agenda a little bit. I apologize. So we're on LB 756. Senator Chambers has just opened and I'm taking proponent testimony. Are there any opponents? Are there any neutral testifiers? Neutral testifier? And, again, we're going to make use of the on-deck area so, hopefully, you've signed in so we don't have to wait while you do that. That's all right.

MARK RHODES: I'm here for the LB 755 is what...

SENATOR BOURNE: Okay. So you want to testify in a neutral capacity on LB 756?

MARK RHODES: That's correct.

SENATOR BOURNE: Okay, come forward.

MARK RHODES: Thank you, Senator Bourne, members of the committee, my name is Mark Rhodes. That's R-h-o-d-e-s. I am the chief prosecutor for the Douglas County Attorneys Office and I am here on behalf of and at the request of the Nebraska County Attorneys Association. In association with Senator Chambers' LB 756...?

SENATOR BOURNE: We're on LB 756 now.

MARK RHODES: ...LB 756, very brief comment. I'm here more to address LB 755. Senator Chambers is right in that this bill seeks to codify Nebraska Supreme Court cases on at least three separate occasions. The Nebraska Supreme Court has ruled that there is a requirement that there be a probable cause connection between the individual that the affidavit seeks to obtain this nontestimonial evidence from. The position of the County Attorneys Association is that is the law of the land as established by the jurisprudence. We take a very neutral position on this until we see a final draft of the bill. That's really all the comments I have. Like I said, I am more here to address LB 755 but I'll be

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glad to entertain any questions.

SENATOR BOURNE: Thank you. Questions for Mr. Rhodes? I think this is our first time in front of the committee?

MARK RHODES: It is.

SENATOR BOURNE: Welcome.

MARK RHODES: And let me say that it is truly an honor and a privilege to be here before you. In my 15 months as a Nebraska resident, I'm constantly amazed at the kindness and courtesy that I've been shown by the citizens of this great state and again it is truly an honor and a privilege to appear before you. Thank you.

SENATOR BOURNE: Thank you and welcome to the committee. No questions. Other testifiers in a neutral capacity on LB 756? Senator Chambers to close. Senator Chambers waives closing. And again, I apologize for the confusion. I think we're going to go next to LB 410. Senator Flood to open on LB 410 and then after this bill then we will go to LB 755.

LB 410

SENATOR FLOOD: (Exhibit 6) Good afternoon, Chairman Bourne, members of the Judiciary Committee. My name is Mike Flood, F-l-o-o-d and I represent the 19th Legislative District. LB 410 which is before you now is kind of a technical change to a situation that occurs all too often and I'll just tell you exactly what it's about. In my private practice as a lawyer a lot of times I represent one of the parties in a divorce or dissolution of marriage action. Let's imagine for a moment that Joe and Mary have decided they're going to get divorced or maybe one of the two decided they're going to get divorced so they go through the process. At some point and let's say, for instance, Joe and Mary own a home. At some point, the court either by stipulation between the parties or after a trial will enter an order. Most often or more often than not, one of the parties will relinquish their rights in real estate that is jointly owned between Joe and Mary. So let's say, for instance, Mary receives the house. Joe no longer has any right or title in the house according to the court order. And a number of lawyers in

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the state in their court order that's prepared for the judge to sign will say that Joe has to execute a quitclaim deed to Mary relinquishing his right and title in the real estate. As you can imagine, after a court hearing or even sometime after that if child support is involved and child custody is a continuing issue and the two parties continue to be at each other's throats, it's hard to get Joe to sign a quitclaim deed even though the court has ordered him to do so. And at great expense to Mary, she'll have to go back to the court and get an order from the judge specifically holding him in contempt if he fails to sign that quitclaim deed. So what you have happening once in awhile is you'll have a lawyer that has to file a dissolution of marriage, you know, a divorce decree essentially with the register of deeds evidencing the fact that Joe's interest in the real estate has been conveyed to Mary. That does operate as a quitclaim deed in that circumstance. The problem is, you have your entire life history with your children and your finances and the bills you have and the assets you have laid out for everybody to see at the register of deeds' office. This bill creates a certificate that essentially assigns what Joe had pursuant to the court's order to Mary that will be run through the district court clerk's office that can be filed at the register of deeds' office. It's important to note that this bill, as written, does not itself operate as a quitclaim deed but it serves as evidence of a court order that has already been rendered in case number whatever in any county Nebraska. That's what this bill seeks to accomplish. I found a few errors, really just omission of language I'd like to change. And it's really just technical. I was a little concerned after I reread the form that's prescribed in the statute that it doesn't exactly transfer the interest of one to another if there's property held by a number of different parties so I've got amendments to LB 410 which I'd like to distribute at this time and I'd be happy to answer any questions.

SENATOR BOURNE: Thank you. Questions for Senator Flood?
Senator Foley.

SENATOR FOLEY: Senator Flood, if the court order is then filed with the register of deeds, could Mary, you know, hypothetically convey the house to another person? Or would she still need ultimately a quitclaim deed?

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SENATOR FLOOD: She could. If I was representing Mary, I would prefer a quitclaim deed because I think it easily lays out what's happened. The title insurance company would come in and have to read through the divorce decree and sometimes a divorce decree is not specific enough or maybe the legal description is not specific or it may just say Joe shall execute a quitclaim deed to the property located at 104 South Seventh Street, Norfolk, Nebraska. Sometimes that's not an accurate legal...that's obviously not an accurate legal description because I'd rather see Lot 7, Block 4, Norfolk, Madison County, Nebraska. This form, I think, requires the true legal description and easily sets this out, and I think for purposes of title insurance when they come in and they review the, you know, an abstractor or a title insurance agent, when they come in and look at the deeds that have been filed against that real estate I think they'll be able to follow a lot easier. And I know there's a lawyer in McCook and a number of lawyers in my section of the state that would find this very beneficial. Did that answer your question?

SENATOR FOLEY: Yes. Thank you.

SENATOR FLOOD: Okay. Thank you.

SENATOR BOURNE: Thank you. Further questions for Senator Flood? I'm struggling with this concept. Okay, are quitclaim deeds recorded now? If you and I, I mean, basically a quitclaim deed is I disavow any interest in the property. And if I say you and I are somehow in a situation where I would execute that, you would then record that with the register of deeds. Okay. I mean, it strikes me that there's a way in practice as a lawyer that this could be resolved by making the quitclaim deed part of the dissolution of the marriage. You see what I'm saying?

SENATOR FLOOD: I see what you're saying and on its face it would seem simple. But I find oftentimes that day that they get divorced is really the last time the lawyer often has contact until it's modified with the parties. And that's a terrible day to get husband to sign a quitclaim deed if he's absolutely upset or wife, vice versa. Because they feel like they're then physically having to give up another piece of something they worked so hard for.

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SENATOR BOURNE: But isn't there generally in association with the quitclaim deed a check that goes to that party executing the deed? I mean, if you and your spouse are getting divorced and you're leaving the home, aren't you getting a check for half of the equity in the house generally?

SENATOR FLOOD: Sometimes. A lot of times no because he may keep his...Joe would keep his retirement and she would keep the house and there's a trade-off there. You get into a situation where I would say in a good divorce both parties walk away feeling like they lost and that means that there was some true compromise. They don't always see it as true compromise. They always feel like they'd have given everything that they owned or worked for to the other party without getting fairly compensated with what they brought into the marriage. So this would be a way that a lawyer could file something against the real estate that's clear, succinct, and evidences what the judge has already ordered.

SENATOR BOURNE: Thank you. Further questions? Senator Friend.

SENATOR FRIEND: Thank you, Senator Bourne. Senator Flood, would there be occasion and would this bill be looking to produce reparation for that where somebody could actually...I mean, could there be a cause where somebody...and this is like educate Mike on the law day, I guess. Could somebody actually ignore a court order and put the whole situation in limbo and this could solve a situation like that? Could they ignore a judge's order that would force a bill like this to be necessary? I mean, where somebody is technically breaking the law? I mean I...

SENATOR FLOOD: As a...okay, go...

SENATOR FRIEND: No, I guess I'm confused about it.

SENATOR FLOOD: As a family law practitioner, I will tell you that court orders mean very little to two people that were once married and loved each other very much. They operate on a different set of emotions than normal litigants in civil court. And I think if you just look at child custody, court orders often say that minor child shall be delivered at 7 o'clock. Well, if the custodial parent

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decides that he or she didn't get to spend enough quality time with the minor child they'll make the decision that they'll take him back the next morning. And they still operate under that, we both share the kids kind of concept. So I continually find myself back in front of a judge trying to explain the technical aspects of a court order to a party often unrepresented, that doesn't really care what the judge says they have to do because this is their child. Now, take that into the realm of real estate and the dissolution and they will not...it's an emotionally hard thing for them just to give the other party their interest in the home that they've built together. And I guess I wouldn't have introduced this bill if I didn't see this happen in practice quite a bit. And I think a lot of it is the emotion that parties to a dissolution are going through at the time.

SENATOR FRIEND: And only one more thing. Could you talk, and you mentioned this in your opening but can you speak really briefly to a situation what you would do right now without the help of what this, I guess, bill would correct?

SENATOR FLOOD: I would have two options. The first option and the more costly option for my client would have been to file an action or a motion to place the other party in contempt of court for failing to abide by the terms of a court order which would probably cost \$400 to \$500 to file the motion, appear and meet with your client, have a mini hearing on whatever, if they even agree to attend the hearing. Or, I could file the dissolution of...I could file the stipulation and agreement signed by the parties if there is such a stipulation against the register of deeds' files. A lot of times especially in very bitter cases where the judge is forced to decide who gets the house and who gets the farm and who gets this real estate, there is no stipulation and agreement. There's just a court order. And I know a lot of times they don't want that information in the register of deeds' records. It's got their children's Social Security numbers; it's got their Social Security numbers. And it's not in a court file anymore. It's now at the register of deeds' office.

SENATOR FRIEND: Thanks.

SENATOR FLOOD: Thank you.

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SENATOR BOURNE: Further questions for Senator Flood?
Seeing none, thank you.

SENATOR FLOOD: Thank you.

SENATOR BOURNE: First testifier in support?

BILL MUELLER: Mr. Chairman, members of the committee, my name is Bill Mueller, M-u-e-l-l-e-r. I appear here today on behalf of both the Nebraska State Bar Association and the Nebraska Land Title Association in support of LB 510. As Senator Flood has well informed you, this bill does create a certificate of dissolution of marriage that can be obtained from the clerk of the district court after one of the parties to the divorce files an affidavit and this certificate can be filed with the clerk of the district court. This bill was a bill last year, I believe that it was LB 1009 came before this committee. We've worked since last session with the clerks of the district court. Ms. Vetick is here today, the clerk of the district court of Platte County and she was kind enough to offer comments as were other clerks of the district court. What you have before you, the clerks of the district court have looked at and I think that we've addressed the concerns that they've had. We have seen the amendment that Senator Flood provided you. I think that he does make good additions to the bill. This bill originally came to my attention from a committee of the bar called the Real Estate Practice Guidelines Committee. This is a committee of the bar that is comprised of lawyers who practice in the real estate area. Since we've gotten into this and since I've consulted with other lawyers who practice in the domestic relations area like Senator Flood, I really have seen a need for something like this. Senator, you asked what would happen if there wasn't this certificate available? As Senator Flood responded, you could actually take the divorce decree and file it with the clerk of the district court. But as the senator said, there is lots of information in that divorce decree that has nothing to do with the real estate. And it's just cumbersome to have to go to that extent to file it. Senator, and another problem with obtaining this quitclaim deed is, if you submit a case to a court and the court takes the case under advisement and decides at some date in the future, the parties won't even be together when their divorce is decided. They will receive something in the mail

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saying who got the real estate, who got the retirement so the parties aren't together to execute this quitclaim deed. Again, I'm told that it is the divorce decree that actually acts as the transferring document of the real estate. This certificate simply puts the world on notice that this particular piece of real estate has been the subject of a divorce decree. Another problem that we have is if you own real estate in a county other than the county of your residence someone could go to the record in that county and they would have no notice of your divorce in another county. What would happen is this certificate could be filed in that other county; you would go to the register of deeds' office and you would say, oh, these people have been parties to a divorce in another county. You could then go look at that divorce decree. The light is on. I'd be happy to answer any questions you may have.

SENATOR BOURNE: Thank you. Questions for Mr. Mueller? Seeing none...oh, Senator Foley.

SENATOR FOLEY: Just one (inaudible) privacy here that a person's divorce is being...maybe it's the public record anyway so maybe it's not an issue.

BILL MUELLER: Well, it is a public record. One of the advantages of this certificate is you do not have to file your whole divorce decree. So from a privacy standpoint, there will be much less information filed with the register of deeds with this certificate than there might now be if you took your whole divorce decree and filed that. And it is a matter of public record and we think that this is the way that you can minimize someone's requirement to disclose privacy information.

SENATOR FOLEY: Thank you.

SENATOR BOURNE: Further questions? Seeing none, thank you.

BILL MUELLER: Thank you.

SENATOR BOURNE: Next testifier in support? Testifiers in opposition? Are there any neutral testifiers?

MARLENE VETICK: Good afternoon, committee members. My name is Marlene Vetick. I'm a clerk of district court from

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Platte County. I'm also representing the Clerk of District Court Association. As Mr. Mueller stated before, our concerns as the association have been met and resolved and the only things I can add to the previous testimony is things that district court clerks that were concerned about were the words assigned and that we will be required to make the certificate which that wording is not in this bill. And I'd be happy to answer any questions that you have.

SENATOR BOURNE: Thank you. Questions for Ms. Vetic? Seeing none, thank you. Are there neutral testifiers? Senator Flood to close. Senator Flood waives closing. That will conclude the hearing on LB 410. Senator Chambers to open on LB 755. As Senator Chambers makes his way to the witness stand, can I get a showing of hands of those here to testify in support? I see two. Those in opposition? I see one. Those neutral? I see none. So, again, would the proponents come forward and sign in, please, if you have not already done so. Senator Chambers.

LB 755

SENATOR CHAMBERS: Thank you. Mr. Chairman, members of the committee, I'm Ernie Chambers. I represent the 11th Legislative District and because this bill deals with a relatively technical matter, I want my statement of intent to be a part of the record so I will speak from it. This bill preserves constitutional rights in the realm of searches and seizures. The Fourth Amendment to the U.S. Constitution and Article I, Section 7 of the Nebraska Constitution employ identical language to guarantee "the right of the people to be secure against unreasonable searches and seizures." Any search without probable cause is unreasonable. The Nebraska Supreme Court ruled in State v. Evans, 250 Neb. 233, 1983, that probable cause must exist before biological evidence such as DNA may lawfully be seized from a person. In the absence of probable cause, consent must be obtained before a DNA sample may be obtained from a person for law enforcement purposes. Because law enforcement officers have exerted various forms of pressure to obtain "consent" the Nebraska Supreme Court noted in State v. Graham, 241 Neb. 995, 1992, at page 998, "In order for the consent to search to be effective, however, it must be a free and unconstrained choice and not the product of a

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will overborn and consent must be given voluntarily and not as a result of duress or coercion whether express or implied, physical or psychological." The bill informs the public law enforcement officers, prosecutors, and judges of the law governing the taking and utilization of DNA samples both involuntary and voluntary. First, LB 755 restates the law. No DNA sample may be taken for law enforcement purposes without probable cause. Next, LB 755 establishes the procedure for obtaining a voluntary sample where probable cause does not exist including specific requirements to ensure voluntariness. A written advisory must inform the person that a request for a voluntary sample may be refused and that such refusal does not provide probable cause or reasonable suspicion to believe that the person committed a crime. Also, LB 755 provides for the return of DNA samples and any records when a person has been exonerated and a judicial remedy is made available to any aggrieved person. In addition to authorizing an aggrieved person to sue for damages and attorneys' fees, violation by a law enforcement person is a Class I misdemeanor whose penalty is up to one year's imprisonment or \$1,000 fine or both. LB 755 has the emergency clause. Any questions you have I will answer. But some of the language, for example, that relates to purging records is found similar language in the DNA detection of Sexual and Violent Offenders Act which is the law relative to obtaining DNA samples in those kinds of cases. And when a person has been exonerated or if there was a conviction that was overturned the records are to be purged and all samples destroyed so there is no language in this bill which is brand new or is not found someplace else either in a court opinion or in existing statutes. So any questions that you have I am prepared to answer.

SENATOR BOURNE: Thank you. Questions for Senator Chambers?
Senator Foley.

SENATOR FOLEY: How does it work under current law with respect to a person?

SENATOR CHAMBERS: Say it again.

SENATOR FOLEY: How does it work under current law with respect to a person that's been exonerated vis a vis the DNA samples?

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SENATOR CHAMBERS: Well, what they're doing in Omaha is saying, if you have been asked for this voluntary sample and let's say it was voluntary. Some of them were coerced. If you are exonerated, meaning the DNA sample does not connect you with the crime and they have DNA from the crime they won't give that back to you. For some idiotic reason, the legal eagles in Omaha are saying that you cannot get your sample back until somebody has been apprehended and convicted so even though you've been exonerated they're going to hold your sample.

SENATOR FOLEY: And the law...

SENATOR CHAMBERS: It makes no sense because if you're not connected with it they ought to give it back to you.

SENATOR FOLEY: And the law allows them to do that apparently?

SENATOR CHAMBERS: Well, I don't think so and there's a lawyer who might be getting ready to file a lawsuit in Omaha about that but this makes it crystal clear that such a thing is not to be the case.

SENATOR FOLEY: Thank you.

SENATOR BOURNE: Thank you. Further questions for Senator Chambers? Senator Chambers, I have a question.

SENATOR CHAMBERS: Yes.

SENATOR BOURNE: Why do we distinguish between probable cause and consent as it relates to DNA compared to say, probable cause to search your car? You see, you're setting out a scheme where if you want DNA, you know, and it's voluntary you have to have this, this, this, and this.

SENATOR CHAMBERS: Yes.

SENATOR BOURNE: But we don't require that in the law for say a consent to search or some other situation.

SENATOR CHAMBERS: Well, there are consent to search forms that are signed. We have other areas in the statute where the statute specifies what has to be. For example, we just

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had a bill the other day in the Business and Labor Committee which says, if an employer is not going to cover people by, with workers' comp there must be a notice given and a waiver signed and it specifies what the notice says. And it's words to the effect that you are not covered by workers' comp and so forth and if the employer fails to give this notice then that employer shall be held liable as though the people were covered by workers' comp and there's a specification. We had an equine bill where people could ride horses on property and not only did that statute declare what the disclaimer stated but it gave the size of the print and everything else. So since we're dealing with a new type of technology and law enforcement people have been trying to build databases it's necessary to inform a person who is being approached to give a DNA sample that it can't be done as in Omaha where you're led to believe that if you don't give the sample that provides a basis to take you to jail and take the sample. You will be embarrassed in front of your family, in front of friends. They will bring several unmarked cruisers or unmarked cars and guys get out in long coats and all come up to the house. Rather than be embarrassed, these men will give these samples. They don't fit the description given by the police. When some of them get a letter, others don't that they have been excluded and are not a suspect. Their DNA does not implicate them, they cannot get their DNA back. So this is to let the person who is being told that this is voluntary know that you don't have to give it. And it's not a basis for you to be a suspect but if you do give it they're not going to be able to keep that, put it in a database and do as they do in Omaha now and say, you won't get this back which you gave voluntarily until somebody is apprehended. And if nobody is ever apprehended or convicted they will keep your DNA on file forever and treat you as though you are a suspect and yet you were exonerated. And they should not use these stratagems to build a database of DNA.

SENATOR BOURNE: So your justification for setting out what consent is voluntary is the longevity of the DNA. I mean, the police officers don't have to establish whether consent to search your car is voluntary by going through A through C. Do they now?

SENATOR CHAMBERS: Well, if they're going to give you this consent form then you read it and it lets you know that you

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don't have to let them search your car.

SENATOR BOURNE: Okay, but in every instance where they ask you like, you know, you read in the paper about they pull somebody over and they have marijuana or something in their car. And they always often times it says in there that they allowed the search of the automobile. There was one just recently...

SENATOR CHAMBERS: They say it but there was no consent form signed...

SENATOR BOURNE: Okay.

SENATOR CHAMBERS: ...Most of the cops don't want to have to give a consent form because it would let the person know they don't have to consent.

SENATOR BOURNE: I understand that but what I'm saying is there is no requirement in the law today that establishes what voluntary consent is for searches...

SENATOR CHAMBERS: Not in the statute.

SENATOR BOURNE: Okay.

SENATOR CHAMBERS: Right...

SENATOR BOURNE: That's what I wanted...

SENATOR CHAMBERS: ...but as to what constitutes voluntariness, there are court cases and the language is derived from those cases but once again, a person should be able to go to the statute and see what constitutes voluntariness and even some of the cops who may have an interest or prosecutors who don't know.

SENATOR BOURNE: But, again, I'm struggling, why do you distinguish between any search and in a sense a DNA sample is a search. Why...

SENATOR CHAMBERS: But see, here's the thing...

SENATOR BOURNE: ...why distinguish between the two?

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SENATOR CHAMBERS: ...DNA takes something...

SENATOR BOURNE: Why not require this...

SENATOR CHAMBERS: ...DNA takes something from you, a part of you is taken. And it's supposed to be to determine whether or not you did something wrong. If it clears you, that which was taken from you ought to be given back. If you give a consent to search your car and they don't find anything, they don't take your car, they don't take anything. If they say that since you gave them consent to search and they find evidence of a crime, they now have probable cause. We're not talking about voluntariness anymore. You can refuse to let them take your car and they'll take it anyway. You can say I'm not going to jail with you but they can arrest you because they now have probable cause so there are two areas where probable cause exists but advisory need not be given. If they're telling you this is voluntary, it has to be made crystal clear to you what constitutes voluntariness. It doesn't mean just saying yes under pressure. The courts have said that officers have come in uniform and the appearance of that uniform is a type of coercion. The power of the...so a person will say yes but it's not consent because it's not really voluntarily given and that's why the court use the expressions, it cannot be coerced directly, indirectly, physically or psychologically. And in these areas where this biological evidence is taken, the person has to be given these safeguards and the police are not going to tell them the truth. The chief in Omaha, in fact, told the World-Herald that if a person does not agree, well, we have some kind of suspicions so we'll take him in. Well, suspicion is not enough. And the Supreme Court said so but they're violating that without realizing, I guess, that suspicion is not enough. And, oh, go ahead.

SENATOR BOURNE: No, again, I mean I'm familiar not to the extent you are. I'm familiar with the case and I don't disagree with a lot of what you're saying but again I'm struggling as to why are we treating a search of a car differently in that we're not making those folks aware of their rights. And all you're doing is setting out the rights that they already have...

SENATOR CHAMBERS: Well, I'd be in favor of that. But this

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is such an area of clarity, I think, when you're taking something from a person physically that is a part of the person. People might better understand that. I believe whenever a search of a person, papers, effects, a home, a business, there should be an advisory given to that person but the Legislature probably wouldn't agree to that. So I'm going into an area where there is ongoing abuse right now.

SENATOR BOURNE: Fair enough. Let me ask one last question. When you...down on line 15 where it says threat, pressure, duress, or coercion of any kind...

SENATOR CHAMBERS: Yes.

SENATOR BOURNE: ...and you mention if two police officers come to the front door, if they're wearing long coats or they're in...if more than one, how is that definable? Coercion, threat, or pressure. I mean, if more than one...

SENATOR CHAMBERS: Well, that would come up...let's say that a person volunteers to give this DNA or they claim that he or she did. And somehow that DNA does implicate the person. That individual would say, I did not voluntarily give that sample so the lawyer will say, I want it suppressed because there was no consent. So then the matter would be litigated as to whether it was voluntary or not and the police would show why they're going to allege it was voluntary and the other person would establish what constituted the coercion.

SENATOR BOURNE: So there would be a suppression hearing and then the judge would decide whether or not there was duress or coercion. And if he or she determined that then the...

SENATOR CHAMBERS: Right.

SENATOR BOURNE: ...DNA would be...the sample would be suppressed.

SENATOR CHAMBERS: Right because initially the allegation by the police would be that this person consented and the counter would be if the person is charged, it was not a free and voluntary consent. So it was illegally seized. Having been illegally seized because they didn't have probable cause at the time, they had no warrant, then it should be suppressed as the fruit from the poison tree.

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SENATOR BOURNE: Thank you. Further questions for Senator Chambers? Senator Flood.

SENATOR FLOOD: Two questions. How can we distinguish...can we distinguish fingerprint evidence from DNA evidence because right now if you're accused of a crime you may be asked to give fingerprint mold or, you know, they ink them up there? Can we distinguish fingerprints from DNA? Is DNA different than fingerprints?

SENATOR CHAMBERS: Some courts have done that and it becomes a very technical area but when a fingerprint is taken they say, that is a part of identifying you as the person you claim to be when you're being booked in. And it's used for that purpose. But when DNA is taken, it's for the purpose of seeing whether or not you are connected to a crime. So it will be evidence of the kind which requires certain legal steps to be gone through in order for them to get it. They couldn't just come up to you on the street, for example, and say, I want to take your fingerprints. And then if it happens that those fingerprints were found at a crime scene, say, well, we're going to use these against you. They did not legally obtain them. If it's a part of a booking then courts have said, well, that is an identifier and it can be...they can be taken at that time. But as to the ultimate use of them, there might be differing views by different courts. But what I'm dealing with here is where the DNA sample is not taken to determine if the person from whom it's taken is the person he or she says he or she is. But because a crime, a particular crime is being investigated, they have reason to want to see if this person was involved but they don't have probable cause to connect the person so there's no way they can take DNA against the person's will. So they try to get the person to consent and that's where we come in to what I'm talking about here. If any kind of coercion or duress is used and there are court cases that describe the various methods that police have used. And it's not just the uniform or just the cars but certain suggestive comments that you can be taken downtown that this will be done and that will be done. Your children might be taken from you. And some of these tactics have been used. Then the consent is found not to have been voluntary. Anything procured would have been procured without a warrant, without probable cause, and therefore would be

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inadmissible and that's why the language says, if this supposedly voluntary relinquishment of DNA was made and it's found that it was not voluntarily given, that cannot be used as evidence against a person in any proceeding whatsoever. And that language is in an existing statute where if an undercover snitch used by law enforcement is on parole, an inmate, work release, or in any form of custody is used as an undercover agent for law enforcement, any evidence obtained cannot be used in any proceeding whatsoever and the Nebraska Supreme Court has upheld that language, they have applied it. And the idea is that a person under custody is not really free to do whatever he or she is doing. Coercion can be brought to bear to put them in the role of an undercover person, exposing himself or herself to danger so all of that is just taken off the table.

SENATOR FLOOD: Very good. And the other question I had was, if an individual is taken into custody, custodial interrogation, and they drink out of a cup or maybe they smoke a cigarette or they apply their DNA to something that remains on the table when they leave the police station, does your bill have any ramifications on the providing of DNA when a person doesn't know it? For instance, I know in my district, police have used a cigarette flung out of a car window by a suspect and tested that. That's different even than than somebody in the custodial interrogation that sips out of a cup, leaves their DNA on the cup. Will this have any bearing on that when they give their DNA and they don't even realize that?

SENATOR CHAMBERS: This doesn't as such but there are cases where courts have said that certain things that are used as evidence were abandoned by the person to whom they belong or who had possession. Therefore, it was not seized pursuant to an unlawful search or seizure so they might say that if you were drinking from a cup and you left it there you abandoned it and it might be handled that way. But if that cup was going to be the instrumentality used to procure the sample and you knew that and they told you that and then it was used. And let's say your agreement to be there was not voluntary then even though they had it, it couldn't be used.

SENATOR FLOOD: If they advised you they were using it for that purpose.

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SENATOR CHAMBERS: Right, and it's supposed to be voluntary. But it wasn't voluntary. Now if it, in fact, is voluntary and you consent and there is no coercion then it's like having told you, anything you say may be used against you and you're given that advisory, you're told you can have a lawyer. But you proceed anyway, then if you truly voluntarily say things, that can be used. So if...that's why I wanted to have these specifications to establish voluntariness. If the voluntariness is established, then the person consented to give it and to whatever use is going to be made of it. And the person would have to be informed that this is being taken in connection with the investigation of a particular crime. So that, all these advisories are included before the person is asked to give the sample. And if it's truly voluntary, the consent then the person gives it and suffers the consequences.

SENATOR FLOOD: Just for the record though, the...your intent is not to impact the inadvertent giving of DNA with an abandoned plastic cup.

SENATOR CHAMBERS: No, no. Mine is where there is a direct approach to an individual and this discussion takes place that the bill covers. None of the rest of it would I even attempt to draft legislation for and tie it into something like this. This is one clear straightforward item with the intent that I stated, nothing beyond or outside of it.

SENATOR FLOOD: Thank you.

SENATOR CHAMBERS: Okay.

SENATOR BOURNE: Thank you. Further questions? I have one last one. The bill contains a penalty.

SENATOR CHAMBERS: Yes.

SENATOR BOURNE: Go back to the suppression hearing scenario that we talked about earlier. Two police officers and go there to a person's house to get a swab, a DNA sample. And the judge determines that coercion was used so not only is the DNA inadmissible but it also appears as a violation of the law, assuming this is passed. Is that accurate?

SENATOR CHAMBERS: Um-hum, yes.

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SENATOR BOURNE: So they would be charged then with a Class I misdemeanor.

SENATOR CHAMBERS: Yes, but that's negotiable (laughter). We could make it a felony (laughter). No, I'm just kidding, I'm just kidding.

SENATOR BOURNE: No, it just...it, you know, it does strike me as somewhat subjective when, you know, you're relying on a judge to make a subjective decision and it seems to me...and I'm not entirely opposed to this but what I'm saying is that it seems to me that we're basing a criminal charge on one individual's subjective decision and it doesn't seem to be as concrete as other criminal provisions that we have in our statute.

SENATOR CHAMBERS: When I said it's negotiable, what I meant when I said that really was what most people might have understood. That is not essential to the bill or what my purpose is.

SENATOR BOURNE: Further questions? Seeing none, thank you.

SENATOR CHAMBERS: Thank you.

SENATOR BOURNE: First testifier in support?

TIM BUTZ: (Exhibit 9) Good afternoon, my name is Tim Butz, B-u-t-z, executive director ACLU Nebraska. I'm probably not the first one to tell you that law and technology do not keep pace with each other and this is a classic case of it. We're here today talking about this bill because of something that's going on in Omaha that has brought that issue of law and technology into very sharp focus. DNA is a powerful scientific tool. At its best, it has exonerated over 140 people who have had their convictions overturned including 13 that are on death row or were on death row. At its worst, it unlocks your genetic code. It tells employers, insurance companies, and others highly confidential information about who you are as a person, your physical makeup, your predisposition to disease and all sorts of other things that people want and need to hold private. DNA testing can be used to verify that someone that's been arrested is actually the person that's committed

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the crime and Senator Chambers' bill does not affect that at all. Once a person is arrested, once there's probable cause to arrest someone, a test can be ordered and it will be done. But to use it in the way that the Omaha police have been using it goes beyond constitutionally protected rights. It's a textbook example of how not to use DNA testing. And it needs to be brought into check because the officials in Omaha, the police officials are not willing to do it themselves. And if they're allowed to get away with it this time there will be other cases. They will know that they can do it and they will repeat it. Let's give the police credit. They're searching for a serial rapist and that's not an easy task. But they cannot jeopardize their own investigation by their activities and we have some fears, not only on the rights of the innocent people that are being tested and how they're being violated but we're also concerned that the prosecution of the serial rapist may be jeopardized by some of the activities that the police are doing where they're not properly "Miranda-izing" people prior to taking the sample. They are using coercion to gain samples and you're going to hear from someone, I believe, who has had that happen in his family. I'm not going to go into the detail with that and I discuss it in the written testimony. We don't know how many DNA tests have been done. The police have told people hundreds. We don't know if that's true or false because they're being very quiet about this. But the failure of the police to return these samples has forced this issue. There's no reason that we know that those samples have to be retained. There is no database that can protect them. And I call your attention to the fact that the FBI just shut down their e-mail system because it had been breached. And I tell you, if the FBI cannot protect the sanctity of its own communications, anybody can hack into a city of Omaha database. My time is up. Thank you.

SENATOR BOURNE: Thank you. Questions for Mr. Butz? Tim you heard me ask the question of Senator Chambers about how are treatment of DNA consent differently from a search of place? Do you have any thoughts on that?

TIM BUTZ: Yeah. It would be great if police were required to obtain signed consent before conducting any so-called voluntary search and that is a practice in a number of police agencies. And it's recently become the subject of

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consent decrees, I believe, in Maryland and in New Jersey among others where State Patrol, the state police agencies were found to have been engaged in racial profiling. And in the ensuing litigation and settlement, the police were restrained in conducting voluntary searches only when they could obtain signed consents. I think that it's a mark of professionalism in law enforcement that they get a signed consent before conducting any kind of search. It erases all this "Who shot John stuff" when it gets into court. If you have a signed consent form there's no doubt that the person said go ahead and search my house. If there's not a signed consent form then you have the judge having to weigh the testimony of the party who had evidence seized against the part of the police officer and, you know, it just makes it cleaner and it ensures that people understand their rights when consent forms are used. Senator Flood had some questions about the voluntary samples left behind, you know, the Supreme Court has been real clear on that, Senator. That's trash and there is no expectation of privacy attaches to trash. If you walk away from it, it belongs to the next person that picks it up. So I hope that answers the questions.

SENATOR BOURNE: Thank you. Further questions for Mr. Butz? Seeing none, thank you. Appreciate your testimony. Next testifier in support.

DICK DAVIS: Hi, my name is Dick Davis and I'm here representing my family and specifically my son. He's part of the DNA incident related to OPPD and I believe that, you know, that we should have some public discord on this. On the other hand, too, is that I'm not here waving my arms and telling you that, you know, that we need to radically change the system but I am saying to you that the issue needs to have some type of balance that Senator Chambers is trying to perform. The example that you're talking about, balance. And that is, the fact that my son's career advancement was put on hold as this process went through based on the fact that he had to...this assumed his life and he already put a \$2,500 cost to testing for engineering, technology engineering and went there and reduced his test scores by two-thirds. So it does...for a person who's totally absolutely innocent, it does have a dramatic effect. Now he's back on board right now but I want to basically tell you that there are effects of people's lives on both sides

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of this. And what I'm trying to encourage you folks because I'm not an expert in this area but I just want to make sure you folks understand, you know, that there's a balance. And this is the second time my son was involved in a situation like this and the first time it was similar in terms of the African American young black man. And when he was 18 years old, he's 33 right now, and we talked to the family and we, of course, have nothing to fear. And at that time he went and said look, I'll just take a lie detector test. And a young officer named Tommy Warren conducted that test and my son's approach to that was when he wanted to join the armed forces, he joined as a military police. So it's not an issue of saying that the police or law enforcement is wrong. But on the other hand, I think you need to have some balance in terms of the rights of everyone. And so I'm hopeful that you folks will come and work with Senator Chambers to make sure that there's a balance for everyone so everyone can feel good about their, you know, their working situation and their personal situations.

SENATOR BOURNE: Thank you. Questions for Mr. Davis?
Senator Chambers.

SENATOR CHAMBERS: Mr. Davis, do you think it would be reasonable in the case of your son who was exonerated, that the sample taken from him be returned to him?

DICK DAVIS: No question about it.

SENATOR CHAMBERS: As a layperson and you said you're not an expert, what sense would it make for you to be told that your son was exonerated cannot get his DNA sample back until they arrest and convict somebody else for the crime for which their son has been exonerated already?

DICK DAVIS: That would be from our family perspective, that would be unacceptable.

SENATOR CHAMBERS: Have they said they're willing to give him his sample back?

DICK DAVIS: Not until after the case is closed or until they go to, you know, go to trial.

SENATOR CHAMBERS: Do you have any way of knowing how

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securely that sample is being held or whether it's being shared with others?

DICK DAVIS: No, we do not.

SENATOR CHAMBERS: Would you feel better since your son has been exonerated if that sample were returned to him?

DICK DAVIS: No question about it.

SENATOR CHAMBERS: And if somehow they develop probable cause, you understand that then they could take a sample even against his will if they have probable cause to believe he committed the crime?

DICK DAVIS: I understand that but there will be no probable cause but I understand that (laugh).

SENATOR CHAMBERS: I've got another question (laughter) so I'm not suggesting that so let's say that his sample is given, is returned because he was exonerated. The police don't lose anything because if they have reason to suspect the person later then they go with the proper legal basis and get a sample but there's no reason to hold the sample of somebody they have already cleared is there?

DICK DAVIS: No, not at all.

SENATOR CHAMBERS: Now, you're not a boastful man. Did you play football anywhere in your younger days when you wore a younger man's clothes?

DICK DAVIS: Yes, I did (laugh).

SENATOR CHAMBERS: Did you play for the University of Nebraska?

DICK DAVIS: That's right.

SENATOR CHAMBERS: Did you have what they called a successful football career?

DICK DAVIS: Absolutely.

SENATOR CHAMBERS: Would others...because you're too modest,

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say you were an outstanding player?

DICK DAVIS: Others may say that, yes.

SENATOR CHAMBERS: And have you become a successful businessman?

DICK DAVIS: Yes, I have.

SENATOR CHAMBERS: You're an outstanding member of the community?

DICK DAVIS: I hope...I hope, yes.

SENATOR CHAMBERS: Were you instrumental in helping to procure money and establish a scholarship at the university for underrepresented youngsters of various ethnicities and nationalities?

DICK DAVIS: Along with your help, absolutely.

SENATOR CHAMBERS: So you are here as an upstanding citizen suggesting that there's a way to treat people fairly even when the police are conducting an investigation of a serious crime.

DICK DAVIS: Absolutely.

SENATOR CHAMBERS: My final question. No matter how serious the crime may be, do you think the police are entitled to treat a person they've determined is innocent as though he were still guilty or a suspect?

DICK DAVIS: It's not the American way.

SENATOR CHAMBERS: That's all that I have for now.

SENATOR BOURNE: Thank you. Further questions for Mr. Davis? Mr. Davis, I haven't talked about the returning of the sample in my questions of Senator Chambers because it's a no-brainer in my mind. But I am curious about the informed consent. Do you feel that your son was put under a threat, pressure, duress, or coercion to give the sample?

DICK DAVIS: I don't believe so but remember, in terms of

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our family, our family history and our relationship with the police as a whole. But what I think bothered him and continues to bother him, obviously, not to the extent that hurt him as he was trying to continue his career path and, very frankly, I'm doing a very big smile, and he's doing okay. So, but the issue here it's really the process and I do believe that there needs to be some balance to the process. You know, it just can't be, you know, one way. And so you would know, I sat down with Tommy Warren as well, and I said, you know, first we need to clear my son's name. Then we need to do, you know, we need to work with OPPD and then at the very last, you know, we need to sit down with you and see if there is some common ground. I think I'm a reasonable and sensible person, trying to work those situations out. And so, give you the example, is the fact that my son's first experience was pretty positive (inaudible) so he went to the military police. But when the police came in and wasn't fully descriptive of what the deal is, you know, he still could have given a sample but they were not...they talked about an assault, not a sexual assault. And they were not fully clear. Does that mean he would still give the DNA? He may have, he may not have. But the issue is is that it should be his choice. The other issue is the fact that, you know, my son is 6'2" 230, and has, unlike his father has still some ethnic characteristics of his physique. And so given that he wasn't between 5'3" and 5'9" and pot belly, you know, wouldn't it be from a public relations standpoint or community issue or just the support of good people to say look, you don't...you know, you don't fit that mold and walked away. But also understand that this was a serious situation with a rape that was a violent rape. So we're very cognizant of that but then maybe there's an (inaudible) by saying, hey, look, rather than going to this DNA situation, Dick, you know, or my son, why don't you, you know, come take another test, lie detector test? I mean, right now we've not really sat down, you know, because I'm going through a process, a very deliberate process, by the way. But, you know, at some point in time I'm going to sit down with Chief Tommy Warren and say to him, you know, is there another way? Now he may say there is none. But I just think that reasonable people can put processes in place that are balanced, where you get the bad guy and also protect the good guy as well.

SENATOR BOURNE: Fair enough. Further questions for

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Mr. Davis? Seeing none, thank you. Thanks for coming down. Other testifiers in support. Testifier in opposition.

MARK RHODES: Mr. Chairman, I have been informed that the County Attorneys Association's position is neutral on the bill but I believe I am the only person left.

SENATOR BOURNE: Okay.

MARK RHODES: If you allow me just to change this on this form.

SENATOR BOURNE: Certainly. So no testifiers in a negative capacity? So we'll take neutral testifiers.

MARK RHODES: Again, thank you, Senator Bourne, members of the committee. My name is Mark Rhodes for the record, R-h-o-d-e-s. And I am here at the request of and on behalf of the Nebraska County Attorneys Association. I am the chief prosecutor for the Douglas County Attorneys Office. Let me say up front that the County Attorneys Association has authorized me to speak on their behalf that the intent of the bill is fully supported by the County Attorneys Association. As usual, it is a layperson like Mr. Davis that brings to the table the commonsense that's necessary when dealing with legal matters. And the position of the County Attorneys Association is that we follow Mr. Davis' advice and bring all of the stakeholders to the table and discuss and work out a protocol that is appropriate because the bill, as written, with all due respect, Senator, has some problems. And I'd like to address those with you very briefly, if I may. Section 1 simply states that there shall be probable cause. What we're talking about is Sections 2 through 8. Two and three deal with consent. The problem with getting into a protocol in a checklist for consent is that it goes contrary to almost every jurisdiction's policy where the court decides whether or not consent was given because consent is such a subjective thing. And it usually uses the maxim of looking at the totality of the circumstances. That's why consent is usually an issue that is brought up before a trial so that a judge will make a pretrial ruling so that it does not go to the trier of fact, that a judge who can make an informed decision who can decide if that consent was knowing, intelligent, and voluntary. The problem with establishing a checklist is

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that it could conceivably work to the detriment of the person to whom it's designed to protect. There is nothing in this bill that would prohibit a court from interpreting that a signed consent form is prima facie evidence that you consented and that it would not hear any testimony about a coercive attempt to get you to sign it. There could be a request by prosecutors to ask for a jury instruction that says that this signed consent form is to be taken in a light most favorable to the prosecution. There are some problems with removing the issue of consent from the court. Now, does that mean that people who sign a consent form are still not going to come in and file motions to suppress? Certainly not. They will. But that will put the court right back where it is right now which is let me look at the totality of the circumstances. Several of you have used illustrations...it appears that my time is up.

SENATOR BOURNE: If the committee is...I mean, given that we're going to have an early day today, is it okay if we waive our process for a few minutes?

SENATOR CHAMBERS: Since it's on my bill, I will agree to waive and I may ask for that in the future.

SENATOR BOURNE: Thank you. (laugh) In the future. Somebody write that down (laughter). Listen, I think this is a dialogue and I...

MARK RHODES: I understand.

SENATOR BOURNE: ...and I think this is important so the committee would benefit from hearing exactly how this impacts us.

MARK RHODES: I do appreciate it and it's probably the first time in my life that I've been traded to be, for a speaker to be named later so I appreciate that, Senator. It makes me feel like I've made the waiver list. So my point is, is that if we enact this bill as it's written, if we have a checklist and you're absolutely right, Senator Bourne. We don't have that checklist for other consents, vehicle searches. We don't have that. We don't have a mandatory requirement on house searches because consent is such a nebulous thing. So we remove this from the Judiciary and we remove it from the appellate court system with a checklist

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but yet we still allow individuals to raise the argument that DNA is unique in the fact that it is taking something from you. I would have to beg to differ. I believe fingerprints are representative. Voice exemplars. Handwriting exemplars. Blood. I do believe that the police can take certain things from you that are consistent with DNA as far as its genetic makeup. But my point is is that I don't disagree and I don't think the County Attorneys Association has any real opposition to having a consensus on how do we do DNA sampling. But as Mr. Davis said, a dialogue between prosecutors, police, defense lawyers, the people with the state of Nebraska through its duly authorized representatives, the victims' rights advocate groups, my fellow brother of the ACLU, Mr. Butz, people like that. We should all come to the table and say, this is a very serious issue. How can we do this where we are working in the best interests of everybody and we're not having a chilling effect on the police because generally these are very serious crimes. Let's face it. We don't do DNA on automobile thefts. It's cost prohibitive. Okay? So I have an issue with the consent as written. I don't have an issue with continuing the dialogue.

SENATOR CHAMBERS: Mr. Rhodes.

MARK RHODES: Yes, sir.

SENATOR CHAMBERS: As we go along, we ask questions. First of all, I don't know what my colleagues would say but I don't legislate by consensus, asking people to come together. How long have you been in the city of Omaha?

MARK RHODES: Fifteen months.

SENATOR CHAMBERS: You're aware of the controversy surrounding DNA, I'm sure.

MARK RHODES: Yes, I am, Senator.

SENATOR CHAMBERS: You were even questioned by some reporters as to advice that the county attorney's office may have given to the police, weren't you?

MARK RHODES: That's correct, Senator.

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SENATOR CHAMBERS: And what was it that you said, the county attorney's office had told the police?

MARK RHODES: When questioned about that, I didn't have an independent recollection of that because the discussion I had with the police was the methodology for obtaining the information from OPPD which was subpoena versus search warrant. If the police took the position that we discussed DNA, I don't stand ready to correct them. It was not of the...the thrust of the conversation was not about that. If the officer says, we discussed it then I don't have any reason to doubt that. And subsequently, DNA was obtained and it was obtained through a consent. I would have no problem with saying that if we discussed it, I would have said that this order or this warrant is only going to allow you to obtain DNA from anyone by virtue of consent. This order is not going to give you the power to extract DNA.

SENATOR CHAMBERS: Now if a description is given by the police of a suspect between 5'3" and 5'9" what business would the police have going to a man 6'1" and another 6'4"?

MARK RHODES: Senator, I can't comment on the actions of the police.

SENATOR CHAMBERS: Well, yes, you can because you say everybody should sit down and talk about it. And I'm telling you things that actually happened that the chief and others that you mentioned don't want to talk about, did not want to talk about. And when a suggestion and recommendation was made that a committee be established to talk to the chief about setting up protocol, they were turned away so I don't accept what you're saying as Bible because it's not going to work in Omaha. I have another question to ask you.

MARK RHODES: Well, may I respond to that?

SENATOR CHAMBERS: All right, go ahead.

MARK RHODES: I can't be held accountable for the other stakeholders' ability or willingness to come to a table.

SENATOR CHAMBERS: I'm not holding you accountable. I'm explaining to you why I'm not going to go where we have gone

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before for no purpose. You're here...

MARK RHODES: I'm sorry. I thought you asked me...I'm sorry.

SENATOR CHAMBERS: ...to try to prevent. No, you're here to try to prevent this bill from moving forward. You're exemplifying the tactic of the county attorneys. You may not know that but let me continue because I want to ask you some questions. You're not aware of there being advisories that statutes require to be given and the statute sets out the content of those advisories? You're not aware of that having been done by legislatures?

MARK RHODES: In the state of Nebraska?

SENATOR CHAMBERS: Anywhere.

MARK RHODES: Well, Senator, I don't think I could comment on the entire jurisdiction of each individual state in the Union.

SENATOR CHAMBERS: I didn't ask you that. I asked you, are you aware of any?

MARK RHODES: Of any state in the Union,...

SENATOR CHAMBERS: Yes.

MARK RHODES: ...having requirements for forms to be filled out?

SENATOR CHAMBERS: Of any advisory, right.

MARK RHODES: I don't doubt Mr. Butz's statements that there are states that have it. I have no reason to doubt the veracity of Mr. Butz's statements.

SENATOR CHAMBERS: Now, when you talk about problems with consent and the specifications in this bill, show me, if you will, since you've analyzed this, something set forth in this bill that is not a part of voluntariness or something which a court has not looked at in determining whether or not consent was voluntary.

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MARK RHODES: I don't think that's possible for anyone to do. That's my point is that that is a voluntariness is such a subjective thing that you will never be able to codify what's voluntary.

SENATOR CHAMBERS: But this does give a bit of objectivity and gives some guidance to the court or to anybody else who is going to take one of these samples in the first instance as to what steps must be gone through before taking it. Would you agree with that?

MARK RHODES: I'm sorry, I didn't understand the question.

SENATOR CHAMBERS: Let me simplify it. Somebody who is a law enforcement officer is going to approach a person for a DNA sample which will be voluntary because there is no probable cause.

MARK RHODES: Correct.

SENATOR CHAMBERS: If that officer must tell the person that this request may be refused that will give the person some information in terms of his or her option. Would you agree with that?

MARK RHODES: I would agree that the United States Supreme Court has said that that is not necessarily a component...

SENATOR CHAMBERS: I'm not talking...Mr. Rhodes, don't play the lawyer with me today. Please. I'm aware of things that go on in Mr. Dornan's office and I'm aware of what county attorneys have done here. And I'm not a child and I'm not a fool and you can understand questions. I'm not asking about the Supreme Court. I'm asking about this bill and...

MARK RHODES: Senator...

SENATOR CHAMBERS: ...the parts of it that you brought up.

MARK RHODES: You're...

SENATOR CHAMBERS: Now, I'm going to ask you the question and I'll try to make it simple enough for you to understand.

MARK RHODES: I understood the question...

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SENATOR CHAMBERS: If an officer tells this person, I'm requesting that you give this sample but you don't have to. Here's what I asked you. Does that inform that person of an option that he or she has?

MARK RHODES: I would think that a reasonable person would hear that statement and assume it to mean that they have an option, yes.

SENATOR CHAMBERS: Okay. Now, when we go down each one of these items that would be included in this bill, when we say no threat, pressure, duress, or coercion, that is addressed to the officer and it will also be available to a person who would feel that his or her consent was not obtained voluntarily. Bills like this are written because law enforcement has stepped over the line. Now I'm going to ask you a question that apparently Mr. Dornan's office has advised the police on. First of all, you have a female prosecutor in your office and she occasionally consults with the police. Is that true?

MARK RHODES: I think you're speaking of Ms. Retelsdorf and...

SENATOR CHAMBERS: Right.

MARK RHODES: ...but there are several female officers but...

SENATOR CHAMBERS: Ms. Retelsdorf.

MARK RHODES: ...given your history, I would say yes.

SENATOR CHAMBERS: Okay. And she was quoted in the paper in connection with some of these things. Your office apparently has told the police that if a person has been exonerated through his or her DNA, it should not be returned to that person until somebody is convicted of the crime. Your office advised the police of that, didn't they?

MARK RHODES: I don't know that they did but I'll take your word for it that that happened and I was going to address that in my second part of the analysis of the bill. Why...

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SENATOR CHAMBERS: Okay,...

MARK RHODES: ...why that can't happen...

SENATOR CHAMBERS: Well, why don't you address it now since I'm asking the question?

MARK RHODES: Certainly, I'd be glad to. The problem with purging is that in its purest form it is absolutely supported by the county attorneys' office. The police prosecutorial arm of the law enforcement community which I have the privilege to represent have no desire to keep an individual, a citizen's DNA in perpetuity, no desire whatsoever. The DNA database that is in the Nebraska Criminal Code specifically only allows for the inclusion of certain DNA samples which are sex offenders and certain other enumerated convicted felons. All right. Where we have a gray area, where we need discourse in is that this is a legitimate problem that the senator brings to the forefront, is what happens to this DNA? The problem is, is that the statute as written would require it to be returned. That is in direct contravention with the discovery statutes which require that in a prosecution the state has to turn over all evidence that was tested or available for testing to the defense. And if it does not or cannot, because it has released it or has used it up in destructive testing, then the evidence is inadmissible so if you get a case where...DNA by its nature is an exclusionary tool. That's what it can do with absolute certainty is exclude someone. If you get a case where you have DNA samples from suspects that either you got them by consent or you got them because you had probable cause at that time. But you end up ultimately with another suspect and you're going to prosecute that individual and his lawyer requests what evidence did you have? What evidence did you test? And you've returned that DNA. You can't give it to them then you can't introduce evidence that it wasn't somebody else. So the other guy, defense, now becomes viable. If I'm on trial and my whole defense is is that Senator Flood committed the offense and if the prosecution could introduce Senator Flood's DNA to show that he is 100 percent excluded, that certainly enhances all of our good because it allows the prosecution to use truth on its side for prosecutorial benefit. But if I can't introduce that the jury is left with what I know to be a known fallacy is that Senator Flood

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could have potentially been the perpetrator to create a reasonable doubt.

SENATOR CHAMBERS: Mr. Rhodes, so that it won't seem theoretical, I'm the defendant...

MARK RHODES: Yes, sir.

SENATOR CHAMBERS: ...that you were talking about. A DNA sample is taken from Senator Flood at some point and he was exonerated.

MARK RHODES: Um-hum.

SENATOR CHAMBERS: I cannot simply tell the court that there are other people who could have committed this crime and there was DNA taken from any number of people and is not here so I want that to be used to help establish my innocence when there is evidence that attaches me to the crime but nothing that attaches to them. That is one of the most preposterous, far-out, untenable explanations I've ever heard. These people remember according to this, would have been exonerated. They had nothing to do with it. If my DNA connects me to the crime and you say there are people whose DNA you had that didn't...how is that even going to come in? That's not relevant.

MARK RHODES: Senator, if your defense...and let me apologize. Maybe I didn't make my hypothetical clear enough. Let's assume that Senator Flood did have some connection with this crime. He's not just a phantom suspect that was picked up on some other case...

SENATOR CHAMBERS: Well, the ones that I'm talking about were not connected to any crime, not by probable cause, by their DNA or anything. What you're telling me is, in fact, the police have taken samples from hundreds of black men then all of those men will have to have their DNA held until the police convict somebody. Now all hundred of them could not possibly be implicated. How is the defense going to tell a court, I want you to bring in the DNA samples of 100 men who have been exonerated by DNA?

MARK RHODES: Because all the defense has to do is cite the discovery article which is Section 29-1913 and I have a

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legal obligation to give it to them. If I cannot give it to them, then I cannot introduce any evidence at all. So if it becomes germane that someone else was excluded and, believe me, that happens with great regularity...

SENATOR CHAMBERS: Mr. Rhodes,...

MARK RHODES: Senator, I...

SENATOR CHAMBERS: ...no, I want to understand what you're telling me.

MARK RHODES: ...I...I have tried not to interrupt you. I would appreciate a return on the courtesy...

SENATOR CHAMBERS: No, no, look. You chose to come up here. We ask the questions and you don't tell me how to conduct it...

MARK RHODES: I'm not...

SENATOR CHAMBERS: Now I'm going to ask you a question about what you said. You cited a statute. I don't know what they do in Louisiana or people of my complexion. My mother is from Rayville and I know the attitude toward people of my complexion in Louisiana. And you're in a different place dealing with somebody else now. You cited 29-1913. I would like you to read it.

MARK RHODES: First, can I respond to your...?

SENATOR CHAMBERS: I'd like you to read first what you cited.

MARK RHODES: Well, Senator, I did not check my dignity at the door.

SENATOR CHAMBERS: I would like you to read what you cited.

MARK RHODES: I will read it but I will tell you that I take great offense that you have insinuated that because I am from a state other than the state of Nebraska that I have some prejudices against people of color.

SENATOR CHAMBERS: I'm listening to what you said and your

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attitude toward me. Are you going to read it or not?

MARK RHODES: I will very well read it. I just wanted the record...

SENATOR CHAMBERS: Then please read it.

MARK RHODES: I just wanted the record to reflect that I don't think that by appearing here today I have subjected myself to this.

SENATOR CHAMBERS: Would you please read what you...

MARK RHODES: Certainly. Would you like me to read the title of the statute as well?

SENATOR CHAMBERS: No, I want you to read...Mr. Rhodes, you cited...

MARK RHODES: Well, okay, let...

SENATOR CHAMBERS: ...a statute. I asked you to read the statute you cited. Now if your dignity won't let you do that you can stop testifying.

MARK RHODES: It is a rather long statute. I was only asking if you wanted me to read the germane parts or the whole thing but I will read the whole thing, Senator.

SENATOR CHAMBERS: Thank you.

MARK RHODES: 29-1913. Discovery; evidence of prosecuting authority; test or analysis by defense; when allowed; when inadmissible. Subsection 1. Is there a page here that could get me a cup of water? One, when in any felony prosecution or any prosecution for a misdemeanor or a violation of a city or a village ordinance for which imprisonment is a possible penalty the evidence of the prosecuting authority consists of scientific tests or analyses of ballistics. Firearms, identification, fingerprints, blood, semen, or other stains. Upon motion of the defendant the court where the case is to be tried may order the prosecuting attorney to make available to the defense such evidence necessary to allow the defense to conduct like tests or analyses with its own experts. The

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order shall specify the time, place, and manner of making such tests or analyses by the defense. Such an order shall not be entered if the tests or analyses by the defense cannot be made because of the natural deterioration of the evidence. Subsection 2. If the evidence necessary to conduct the tests or analyses by the defense is unavailable because of the neglect or intentional alteration by representatives of the prosecuting authority other than alterations necessary to conduct the initial tests. The tests or analyses by the prosecuting authority shall not be admitted into evidence.

SENATOR CHAMBERS: Now,...

MARK RHODES: Yes, sir.

SENATOR CHAMBERS: ...this is evidence that is to be used against the defendant, isn't that clear from that statute?

MARK RHODES: No, sir. That's just evidence that the defense seeks to use. And if I...

SENATOR CHAMBERS: When you read that, it says the defense...when they say the defense they mean the lawyer who is representing the individual who is accused. Would you agree with that?

MARK RHODES: Yes, sir.

SENATOR CHAMBERS: Now, the evidence that the defense would seek to have omitted would be evidence being used to establish the guilt of the accused. Would you agree with that?

MARK RHODES: No, sir, I would not agree with that. That's not what this statute says.

SENATOR CHAMBERS: Okay, then there's no need in me pursuing it.

MARK RHODES: Okay.

SENATOR BOURNE: Thank you. Further questions for Mr. Rhodes? Senator Friend.

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SENATOR FRIEND: Thank you, Senator Bourne. Mr. Rhodes, I wanted to touch on something, on a line of...a direction you were going here with the consensus, the discourse, you know, with the law enforcement, you know, community in order to come to a...I wouldn't say some middle ground but somewhere in this bill that you think that all the players would be, I guess, at the table. I guess the thing is and I didn't want to really go down this road too hard. I mean, I've been in here on a few occasions and I've been in this Legislature for almost three years now and I've carried, I believe, the law enforcement in Omaha for various reasons does a very good job. And I'm also a...I wouldn't call myself a champion necessarily of a lot of their causes but I'm here trying to do some good for them. And I think what puts us in a precarious situation here is that when even somebody like me could sit here and hear you say that they need to be at the table. Well, that's the table right there. And I've been here with cops in this room. I like them; they like me; they have a good working relationship with this committee. And I think it's...I guess what I'm getting at is it's a little disturbing the direction you went here and that's why I do wish and I will inform my friends with the Omaha Police Department that I do wish that they were here to address this issue because it is...you raised some interesting points here in this bill that I'm willing to look at but I do wish if they had concerns about this, if they've read it, that they were at that table to discuss them. And I don't necessarily...you can comment if you'd like. I think that's where this gets a little...where the trepidation lies.

MARK RHODES: I can only comment that I don't think it's uncommon for law enforcement officers in matters like this to defer to the prosecution. I don't think they're not here because they don't care. I think it's very common for the law enforcement community when you get into legislative issues involving statutory jurisprudence to defer to the prosecution. I know that...

SENATOR FRIENDS: You're right, sir, except...sorry to have interrupted you.

MARK RHODES: Sure.

SENATOR FRIENDS: You're right, sir, except that I had a

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bill this year already that dealt with, you know, some pretty significant issues and they were here and they stood up. I'm a little confused about, we have language here. If it's of a concern, all I would submit to you is if this language is of a concern to OPD I'm going to find out about it because I can.

MARK RHODES: Um-hum.

SENATOR FRIEND: And I'm going to...and if they have a problem with it I'm going to tell them they should have been at that table. And they'll listen to me, I think.

MARK RHODES: Well, and...

SENATOR FRIEND: If they're not willing to listen to anybody else on this committee they'll listen to me. I'm not trying to browbeat you. I just feel like the direction you went here with the discourse, that they'd like to be at the table, they could have been at the table.

MARK RHODES: Well, I'm not carrying their message. I'm saying that I agree with Mr. Davis that discourse is appropriate before we go into legislation and that's all...

SENATOR FRIEND: I understand your point.

MARK RHODES: ...I don't want to give the appearance that someone is not here, is not interested in the discourse. I do not want to be the...perceived as that.

SENATOR FRIEND: Okay. Thank you, thank you.

SENATOR BOURNE: Thank you. Further questions for Mr. Rhodes?

SENATOR CHAMBERS: Just a comment.

SENATOR BOURNE: Senator Chambers.

SENATOR CHAMBERS: I'm not going...Mr. Davis has testified. I'm going to find out if he is in accord with you because you keep quoting him and saying, as Mr. Davis said, if you all have talked and if he was really representing the same position you're representing here today. And I'm glad he's

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still in the room because he will have heard you and I'm going to discuss it with him and find out if he's saying the same thing you said and if he is, why he spoke in favor of this bill. Why he talked about the problems created for his son, why he talked about balance which does not exist now.

MARK RHODES: Is there a question for me, Senator?

SENATOR CHAMBERS: I'm just letting you know that I intend to explore it with him.

MARK RHODES: Okay, I appreciate that.

SENATOR BOURNE: Thank you. Further questions? Seeing none, thank you.

MARK RHODES: Thank you.

SENATOR BOURNE: Other neutral testifiers? Senator Chambers to close.

SENATOR CHAMBERS: Mr. Chairman, members of the committee, I don't work with the county attorneys' office in Douglas County like a blank tablet. I've talked to them and dealt with them on a number of issues. I've been down there and I've seen Mr. Rhodes in that office and he has seen me. I've written correspondence to them which they had to accept my position on because I was right on the law. And I have copies of that because I keep it all. For this man to come here and tell you that when he reads a statute that relates to the defense that it doesn't really apply to evidence that would be used against the defendant. That makes no sense. If I am a defense lawyer and I'm representing Senator Foley, the only evidence I'm interested in is evidence they're going to use against him. They will say, we have some DNA which implicates your client. We tested it and this is what we came up with. I said, I want to check the chain of custody of that evidence and if it's DNA I want my people to test it. And if it was deteriorated, if it was deliberately tampered with, or if there's anything that causes it to be flawed, that evidence cannot be used. It has nothing to do with evidence of something taken from somebody else. How would evidence taken from Senator Flood be used to implicate my client? The only evidence I as a defense attorney am concerned about is the evidence they're going to use against

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my client. And I could not tell the court that since there is not a DNA test of every possible person which can be used and compared to my client you cannot use the evidence you've got from his DNA. That's the lengths the Douglas County Attorneys Office goes to and it's the insult they pay to the intelligence of this committee. We had a bill the other day dealing with pseudoephedrine. We had police from several different jurisdictions, the State Patrol and some local, I don't know if any were from the county but they do come when they have an issue that is of concern to them. So if this committee is going to be swayed by what they heard from that county attorney then we're going to have to have some very serious discussions. And when the county attorneys association sends people here then they need to inform that person that that person does not run the show. If a person goes before a judge that person doesn't tell the judge how to conduct the trial. And when he's going to be expansive and go off in all directions and treat us as though we are uninformed as some of the people the county attorneys office deals with they make a mistake. I am cordial when people allow me to be but I'm not going to be talked down to and treated as if I cannot understand the statutes that we put in place. I was here when DNA statutes were enacted and we were talking about evidence to be used against a defendant. And if that evidence has been tampered with, it can't be used, not something that pertained to somebody who has nothing to do with the case.

SENATOR BOURNE: Questions for Senator Chambers? Senator Aguilar.

SENATOR AGUILAR: What I'm trying to follow, Senator Chambers, in the situation that we're talking about in this case here, if the young man were to be given his DNA samples back,...

SENATOR CHAMBERS: Um-hum.

SENATOR AGUILAR: ...and the defense attorney for somebody else that got arrested wanted to do that, wouldn't he have the right to go to that young man and ask him to provide another sample?

SENATOR CHAMBERS: No, it's irrelevant. There's no relevance at all.

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SENATOR AGUILAR: My point is, Senator, that is, as long as there's still a living, breathing person out there that evidence is still available.

SENATOR CHAMBERS: Well, nobody could make him give that evidence as the police couldn't in the first place because they didn't have probable cause.

SENATOR AGUILAR: Um-hum.

SENATOR CHAMBERS: Now here's what I was exploring with Mr. Davis. So let's say that I supposedly voluntarily gave a DNA sample.

SENATOR AGUILAR: Um-hum.

SENATOR CHAMBERS: I was exonerated. They give it back to me. They don't have to say, well, if we have developed evidence that would give probable cause that Ernie's involved, they could not then arrest me and take a DNA sample whether I wanted to give it or not. They could still take it but they cannot be taking it without probable cause and if it was supposed to be voluntary they should give it back and they cannot hold it and say, we're going to keep yours until we arrest somebody else. Yours was voluntarily given in the first place. You never relinquished your right to it at any point. They did not tell you when they came to you that even when you're exonerated we're going to keep this until we arrest and convict somebody else. You'd never give it. And it's always there. You don't know what they're doing with it. And all this bill is saying is that when this sample is taken voluntarily and the person is exonerated, you show the same good faith that person showed in giving it to you and give it back. There's no reason to keep it. If it implicates the person, this bill doesn't even apply. It says, if the DNA is taken and it does not implicate the person in the crime, give it back. What are they going to keep it for when they're going after somebody else or if they've got somebody else? It's irrelevant. The person has been exonerated. Give it back. I don't know what the last testifier was talking about.

SENATOR BOURNE: Thank you. Further questions for Senator Chambers? Seeing none, thank you.

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SENATOR CHAMBERS: Thank you.

SENATOR BOURNE: That will conclude the hearing on LB 755
and the hearings for today. Thank you.